IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-01-3624 and Consolidated Cases
(Jury)

MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

ENRON CORP., et al.,

Defendants.

DEFENDANT J.P. MORGAN CHASE & CO.'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS THE CONSOLIDATED COMPLAINT

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Defendant J.P. Morgan Chase & Co. respectfully submits this Reply Brief in Further Support of its Motion to Dismiss the Consolidated Complaint. For the reasons set forth herein and for the reasons stated more fully in J.P. Morgan Chase & Co.'s May 8, 2002 moving brief (the "Moving Brief"), filed together with an accompanying appendix (the "Appendix"), the Consolidated Complaint (the "Complaint") should be dismissed with prejudice pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995 (the "Reform Act"), codified at 15 U.S.C. § 78u-4(b)(3)(A).

PRELIMINARY STATEMENT

Without apology, Plaintiffs ask this Court not to apply but to change the securities laws. Plaintiffs' basic and specious argument is that exigent circumstances — like those here — give courts license to rewrite statutes enacted by Congress and interpreted by the Supreme Court. For Plaintiffs, the prospect that the actual perpetrators of Enron's alleged fraud lack the ability to cover all investor losses justifies disregarding the law to reach others with greater financial capacities. In their response to the Moving Brief, Plaintiffs demand both the repeal of the strict pleading requirements for securities fraud claims mandated by the Reform Act and reversal of the Supreme Court's decision in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994). Indeed, if this Court follows the law and dismisses the claims against J.P. Morgan Chase & Co., Plaintiffs vow to petition "Congress . . . to act by ameliorating the harsh pleading standards [of the Reform Act] and restoring aider and abettor liability" abolished by *Central Bank*. Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss by J.P. Morgan Chase ("Plaintiffs' Brief"), at 43. While Plaintiffs have every right to ask Congress to change laws they don't like, unless and until the

Reform Act is repealed and *Central Bank* is reversed, private plaintiff securities complaints must be dismissed where, as here, they fail to allege facts with the required particularity and seek recovery for aiding and abetting conduct.

J.P. Morgan Chase & Co., or more accurately its various subsidiaries, affiliates and predecessors (collectively "JPMorgan Chase"), did no more than engage in financial transactions with Enron Corporation ("Enron") during the years preceding Enron's December 2001 collapse.[1] Despite 134 pages of tangled, knotted and convoluted arguments and re-formatted (and sometimes new) allegations in their response to JPMorgan Chase's 36-page moving brief, Plaintiffs allege no facts sufficient to sustain any securities fraud claim against JPMorgan Chase. There can no longer be any doubt that JPMorgan Chase has been named in this litigation *only* because it is a convenient deep pocket. This lawsuit is a wholly illegitimate attempt to make the shareholders of

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[1] Although the Complaint lumps together various JPMorgan Chase subsidiaries, affiliates and predecessors, these corporations are separate entities, many of which were in no way related to one another prior to the December 31, 2000 merger of J.P. Morgan & Co., Inc. ("J.P. Morgan") and The Chase Manhattan Corporation ("Chase"). *See* J.P. Morgan Chase & Co., Inc. Form 10-K, March 22, 2002, at page 1 (Appendix, Exhibit 1). For example, while the Complaint and Plaintiffs' Brief repeatedly refer to the investment of JPMorgan Chase executives in the LJM2 partnership, the fact of the matter is that only executives of pre-merger J.P. Morgan ever invested in the LJM2 partnership (through an investment partnership that passively invested lock-step with a pre-merger J.P. Morgan investment partnership). It cannot be disputed that pre-merger J.P. Morgan had little, if any, banking or investment banking activity with Enron. Thus, Plaintiffs' argument that "top executives" of JPMorgan Chase "were permitted to invest in LJM2 as a reward to them for their ongoing participation in the scheme," *see, e.g.*, Plaintiffs' Brief at 12, is — like many of Plaintiffs' other assertions — pure fiction. Ultimately, Plaintiffs have failed to identify with specificity any act made or knowledge acquired by J.P. Morgan Chase & Co. itself. The Complaint should be dismissed on this basis alone.

JPMorgan Chase, who have seen their own company suffer Enron-related financial losses, pay for the investor losses of Enron's shareholders.

Notwithstanding its length, Plaintiffs' Brief contains very little. And what little there is does nothing to remedy the defects in the Complaint against JPMorgan Chase:

First, Plaintiffs' attempt to wish away *Central Bank*'s absolute prohibition of aiding and abetting liability by disingenuously invoking the terms "deceptive device" and "manipulative device" does not save the Complaint. Under Section 10(b) and Rule 10b-5, deceptive and manipulative devices are specifically defined acts that are limited to: (1) material misstatements or omissions; (2) insider trading or other activities directly involving the sale or purchase of a security by the defendant; and (3) practices, such as wash sales, matched orders and rigged prices, that are intended to mislead investors by artificially affecting market activity. The alleged JPMorgan Chase activities set forth in the Complaint and Plaintiffs' Brief — providing Enron with financing and other financial services, passively investing in an Enron-related partnership, or issuing analyst Research Notes[2] — do not fall within these categories. Even if Plaintiffs could adequately plead these activities (and they have not) and they fit within the definition of "manipulative" or "deceptive" devices, such allegations would be nothing more than inactionable aiding and abetting conduct that was not "in connection with the purchase or sale" of a security under Section 10(b). 15 U.S.C. § 78j(b). Additionally, Plaintiffs' repeated reference to

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[2] Quoted in the Complaint and referenced in Plaintiffs' Brief are 25 one- or two-page "Morning Meeting Research Notes," the first page of a "Company Update" on Enron, and what is described as an e-mail (collectively, the "Research Notes," and individually, a "Research Note").

an alleged "scheme" does not save their claim. Since *Central Bank*, courts have uniformly held that absent a properly pled allegation that a defendant engaged in either a "deceptive" or "manipulative" act "in connection with the purchase or sale" of securities, there is no scheme liability under Section 10(b) and Rule 10b-5.

Second, despite extensively redrafting dozens of pages of the Complaint in their responsive brief, Plaintiffs have still failed to plead with the required particularity any actionable alleged misstatements by JPMorgan Chase within the applicable statute of limitations period.

Third, Plaintiffs have failed to establish in any way (much less with the particularity required by the Reform Act) that anyone at JPMorgan Chase acted with the requisite scienter. None of Plaintiffs' conclusory allegations in the Complaint or their responsive brief of "knowledge" or "motive" — including their illogical assertion that JPMorgan Chase had a motive to participate in a Ponzi scheme — satisfies the Reform Act.

Fourth, nothing in Plaintiffs' responsive brief changes the fact that the Complaint fails to allege that the sale of the securities took place in Texas. Absent such a nexus to the state, the Texas Securities Act claim must also be dismissed.

Finally, Plaintiffs' lengthy brief affords this Court with the opportunity to see exactly how they would replead their claims against JPMorgan Chase if given the opportunity to do so. Since even as repled there is no theory of liability upon which JPMorgan Chase could be liable to Plaintiffs, the Complaint should be dismissed with prejudice.

ARGUMENT

I. Plaintiffs Have Failed To Allege That JPMorgan Chase Committed A "Manipulative" Or "Deceptive" Act "In Connection With The Purchase Or Sale" Of A Security Within The Meaning Of Section 10(b) And Rule 10b-5

Participation in a "scheme" to defraud investors, standing alone, does not give rise to liability under Section 10(b) or any subsection of Rule 10b-5. Rather, securities fraud liability attaches *only* if a defendant committed a "manipulative" or "deceptive" act "in connection with the purchase or sale of any security," as those terms are used in Section 10(b) and Rule 10b-5. Here, Plaintiffs accuse JPMorgan Chase of engaging in a variety of business dealings with Enron which is charged with defrauding its own investors. None of JPMorgan Chase's alleged activities even remotely qualifies as "manipulative" or "deceptive" within the meaning of Section 10(b)/Rule 10b-5 under applicable case law. And none of these activities meets the "in connection with" requirement, because each of JPMorgan Chase's alleged activities is at least one step removed from the sale or purchase of Enron securities. At most, the Complaint alleges JPMorgan Chase aided and abetted *Enron's* perpetration of "manipulative" or "deceptive" acts "in connection with the purchase or sale of [Enron] securit[ies]." 15 U.S.C. § 78j(b). Plaintiffs' claim is thus barred by the Supreme Court's decision in *Central Bank* and is not saved by their false chorus of "scheme" allegations.

Only activities that are "manipulative" or "deceptive" violate Section 10(b) and Rule 10b-5 (and its individual subsections). *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473 (1977) ("The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception. . . . [A] complaint states a cause of action under any part of Rule 10b-5 only if the conduct alleged can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute."); *Ernst &*

Ernst v. Hochfelder, 425 U.S. 185, 212 (1976) (declining to expand Section 10(b) to encompass negligent conduct because the "statute speaks so specifically in terms of manipulation and deception"); *see also Pin v. Texaco, Inc.*, 793 F.2d 1448, 1451 (5th Cir. 1986) ("In order to state a cause of action under § 10(b), a plaintiff must plead facts that would amount to manipulation or deceptive conduct proscribed by that section and Rule 10b-5.") (emphasis omitted); *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 869 n. 18 (S.D. Tex. 2001) (Harmon, J.) ("Section 10(b) bars conduct involving manipulation or deception") (internal quotations omitted).

Allegations that JPMorgan Chase *helped* Enron perpetrate a fraud by lending money to Enron, investing in an Enron-related partnership (LJM2), providing commodity swaps to Enron (the Mahonia transactions), and engaging in other banking or investment banking activities do not constitute "manipulative" or "deceptive" acts. Because Plaintiffs can point to no alleged "manipulative" or "deceptive" acts other than *Enron*'s fraud on its own shareholders, Plaintiffs cannot state a claim for securities fraud against JPMorgan Chase.

A. *Central Bank* Abolished Aiding and Abetting Liability Under All Subsections Of Rule 10b-5

Based on their gross misreading of *Central Bank*, Section 10(b), and Rule 10b-5, Plaintiffs argue "*Central Bank* did not strike down every form of 'secondary' liability. . . . Nor did it hold that only 'primary' violations are cognizable." Plaintiffs' Brief at 68. This argument is directly contradicted by the very language of the Supreme Court's decision that Plaintiffs incompletely quote in their responsive brief:

> Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser

> or seller of securities relies may be liable as a primary violator under 10b-5, **assuming *all* of the requirements for primary liability under Rule 10b-5 are met**.

Central Bank, 511 U.S. at 191 (emphasis in bold added to reflect language omitted from Plaintiffs' Brief at 34; emphasis in italics in original).

Plaintiffs argue that the Supreme Court's decision in *Central Bank* was limited to subsection (b) of Rule 10b-5 and that, therefore, *Central Bank*'s abolition of aiding and abetting liability does not extend to Rule 10b-5 subsections (a) ("any device, scheme or artifice to defraud") and (c) ("any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person"). 17 C.F.R. § 240.10b-5(a), (c). But, Plaintiffs ignore that *Central Bank* comprehensively outlined the limits of liability under Section 10(b) and *all* subsections of Rule 10b-5:

> [Section 10(b)] prohibits *only* the making of a material misstatement (or omission) or the commission of a manipulative act. . . . The proscription does *not* include giving aid to a person who commits a manipulative or deceptive act. We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute.

Id. at 177-78 (emphasis added). Contrary to Plaintiffs' argument otherwise, *Central Bank* addressed not only material misrepresentations, prohibited by subsection (b) of Rule 10b-5, but *also* "manipulative" or "deceptive" *conduct* or *acts*, prohibited by subsections (a) and (c). *See id.* at 178 ("this case concerns the *conduct* prohibited by § 10(b)") (emphasis added); *see also id.* at 172 ("the scope of *conduct* prohibited by § 10(b)") (emphasis added); 173 (same); 174 ("the *conduct* covered by § 10(b)") (emphasis added); 175 (same); 177 ("the scope of *conduct* prohibited by the statutory text") (emphasis added); 180 ("the aider and abettor's statements or *actions*") (emphasis added).

Indeed, in beginning its analysis in *Central Bank*, the Supreme Court affirmatively stated that the case involved Section 10(b) and *all three* subsections of Rule 10b-5:

> This case concerns the most familiar private cause of action: the one we have found to be implied by § 10(b). . . . Rule 10b-5, adopted by the SEC in 1942, casts the proscription in similar terms: [quoting the full text of Rule 10b-5, including sections (a) and (c)].

Id. at 171.

Plaintiffs' contention that "primary liability [under Section 10(b)] may [still] be based on participation in a scheme to defraud or a course of business that operated as a fraud or deceit on securities purchasers pursuant to subsections (a) or (c) of Rule 10b-5," Plaintiffs' Brief at 64, is based entirely (and erroneously) on wording differences in the language of Section 10(b) and Rule 10b-5 subsections (a) and (c). *See id.* at 59-60. In advancing this nonsensical argument, Plaintiffs flout Supreme Court holdings that the scope of liability under Rule 10b-5 *is limited* by Section 10(b), even though the literal language of Rule 10b-5 might suggest a broader interpretation:

> Viewed in isolation the language of [Rule 10b-5] . . . could be read as proscribing . . . any course of conduct that has the effect of defrauding investors. . . . [S]uch a reading cannot be harmonized with the administrative history of the Rule. . . . The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. Thus, despite the broad view advanced by the [Securities and Exchange] Commission in this case, its scope cannot exceed the power granted the Commission by Congress under § 10(b).

Ernst & Ernst, 425 U.S. at 212-14 (internal quotations and citations omitted); *see also Central Bank*, 511 U.S. at 173 (holding that a "private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of § 10(b). . . . We have refused to

allow 10b-5 challenges to conduct not prohibited by the text of the statute [§ 10(b)]."); *United States v. O'Hagan*, 521 U.S. 642, 651 (1997) ("Liability under Rule 10b-5, our precedent indicates, does not extend beyond conduct encompassed § 10(b)'s prohibition."); *see also Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1224 (10th Cir. 1996) ("To the extent Rule 10b-5 could be read more broadly than § 10(b), the text of the statute controls."); *Jensen v. Kimble*, 1 F.3d 1073, 1077 (10th Cir. 1993) ("The SEC's authority to proscribe material omissions under Rule 10b-5 cannot exceed the power granted to it under Section 10(b)"); *Advanced Laser Prods., Inc. v. Signature Stock Transfer, Inc.*, No. Civ. A. 3:98-CV-1624-D, 1999 WL 222385, at *2-3 (N.D. Tex. Apr. 12, 1999) (rejecting plaintiff's claim that "§ 10(b) and Rule 10b-5 are much broader, and include any act, scheme, device, practice, or course of business that operates as a fraud or deceit upon any person," and holding that "[t]he language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception") (internal quotations omitted). Thus, none of Plaintiffs' allegations against JPMorgan Chase, which are all quintessential secondary liability allegations, is actionable post-*Central Bank.*

B. The "Manipulative" And "Deceptive" Acts Prohibited By Section 10(b) And Rule 10b-5 Are Limited And Clearly Defined

Because decades of judicial decisions circumscribing "manipulative" or "deceptive" acts under Section 10(b) and Rule 10b-5 mandate dismissal of the Complaint against JPMorgan Chase, Plaintiffs retreat to laymen's and dictionary definitions of these

terms.[3] What Plaintiffs seek to obfuscate is the courts' well-settled confinement of actionable "deceptive" or "manipulative" acts to clearly defined categories. None of these categories creates Section 10(b)/Rule 10b-5 liability for doing business with an entity that defrauds its own investors — even if, as Plaintiffs conclusorily allege, the defendant knew of the fraud.

Unable to locate even a single case upholding a securities fraud claim based on the type of allegations asserted against JPMorgan Chase here, Plaintiffs proffer completely inapposite cases. For example, Plaintiffs cite the recent Supreme Court case of *SEC v. Zandford*, __ U.S. __, 122 S. Ct. 1899 (June 3, 2002), which held that a broker-dealer violated Section 10(b) and Rule 10b-5 when he sold his customers' securities and misappropriated the proceeds. *Zandford* has no applicability to Plaintiffs' allegations against JPMorgan Chase. Plaintiffs obviously do not allege that JPMorgan Chase improperly sold anyone's Enron securities and misappropriated the proceeds. For the Court's convenience, attached as Exhibit A is a chart showing the inapplicability of the principal cases Plaintiffs cite on this issue.

"Manipulative" and "deceptive" have separate and discrete meanings in the context of Section 10(b) and Rule 10b-5:

"Manipulative" acts. "'Manipulation' is 'virtually a term of art when used in connection with securities markets.'" *Santa Fe*, 430 U.S. at 476 (*quoting Ernst & Ernst*, 425 U.S. at 199). "The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially

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[3] As if *judicial* interpretations of the terms "manipulative" and "deceptive" did not exist, Plaintiffs repeatedly refer to *dictionary* definitions of the terms used in Rule 10b-5. *See* Plaintiffs' Brief at 70, n.48.

affecting market activity."[4] *Id.*; *see also Ernst & Ernst*, 425 U.S. at 199 (explaining that the term manipulative "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities"); *Hundahl v. United Benefit Life Ins., Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979) (defining "manipulation" as "practices in the marketplace which have the effect of either creating the false impression that certain market activity is occurring when in fact such activity is unrelated to actual supply and demand or tampering with the price itself"); *In re Commonwealth Oil/Tesoro Petroleum Sec. Litig.*, 484 F. Supp. 253, 267-68 (W.D. Tex. 1979) (same).

"Manipulation" is "not a magic word whose use in a complaint automatically defeats a motion to dismiss." *Pin*, 793 F.2d at 1452. Rather, it is a "term of art [that] cannot be extended to cover every form of unfair dealing which appears to the layperson to be manipulative." *Billard v. Rockwell Int'l Corp.*, 526 F. Supp. 218, 222 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 51 (2d Cir. 1982). Section 10(b) "prohibit[s] [ ] practices deemed by the SEC to be 'manipulative' [only] in [a] *technical* sense of artificially affecting market activity." *Santa Fe*, 430 U.S. at 476-77 (emphasis added).

"Deceptive" acts. "Deceptive" acts within the meaning of Section 10(b) and Rule 10(b)(5) are limited to three categories of activities: *First,* "deceptive" acts include material misstatements or omissions. *See Central Bank*, 511 U.S. at 177 (defining 'deception' as the "making of a material misstatement (or omission)"); *BMC*,

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[4] "'Wash' sales are transactions involving no change in beneficial ownership. 'Matched' orders are orders for the purchase or sale of a security that are entered into with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale/purchase of such security." *Ernst & Ernst*, 425 U.S. at 205, n.25.

183 F. Supp. 2d at 869 n.18 (defining 'deception' as "misrepresentation or nondisclosure intended to deceive") (internal quotations omitted). *Second,* "deceptive" acts include insider trading. *See, e.g., In re Landry's Seafood Restaurant, Inc. Sec. Litig.*, No. H-99-1948, slip op. at 9 n.12 (S.D. Tex. Feb. 20, 2001) ("A defendant need not have made a false or misleading statement to be liable. Insider trading by a corporate insider based on material, nonpublic information, qualifies as a 'deceptive device' under § 10(b) and violates the insider's duty to disclose or abstain from trading"); *BMC*, 183 F. Supp. 2d at 869 n.18 (same); *see also O'Hagan*, 521 U.S. 642 (holding that trading on misappropriated information violates §10(b)). *Finally*, "deceptive" acts include a defendant's improper purchase or sale of securities from, or on behalf of, another entity or individual. *See, e.g., Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) (defendants encouraged Native Americans to sell their UDC stock, without disclosing that defendants stood to profit from such sales); *Superintendent of Ins. v. Bankers Life Cas. Co.*, 404 U.S. 6, 9 (1971) (defendant purchased securities from insurance company without disclosing that it was using the insurance company's own assets to purchase the securities; "the seller was [thus] duped into believing that it, the seller, would receive the proceeds" of the sale); *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1456 (2d Cir. 1996) (broker-dealer firm sold securities to its customers at "excessive prices unrelated to prevailing market prices, resulting in defendants' gaining more than $27 million in illegal profits"); *In re Livent, Inc. Noteholders Sec. Litig.*, 174 F. Supp. 2d 144 (S.D.N.Y. 2001) (investment bank sold securities to plaintiffs and failed to disclose material adverse financial information).

Where plaintiffs have attempted to expand Section 10(b)/Rule 10b-5 liability beyond the foregoing specifically-defined categories of activities, courts have denied Plaintiffs' claims. *See, e.g., Santa Fe*, 430 U.S. at 477 (dismissing complaint on the grounds that alleged fraudulent appraisal of a company's stock in a merger context in an effort to freeze out minority stockholders at an inadequate price is not a manipulative device); *Pin*, 793 F.2d at 1451-53 (denying motion to intervene on the grounds that investor group's purchase of controlling block of shares, and company's repurchase of same at inflated prices were not "manipulative devices"); *Commonwealth Oil*, 484 F. Supp. at 267-68 (granting motion to dismiss on the grounds that misleading tender offer documents were not "manipulative devices"); *Hundahl*, 465 F. Supp. at 1359-63 (granting motion for summary judgment on the grounds that a complex series of transactions designed to depress artificially a company's stock price in order to facilitate a cheaper acquisition were not "manipulative devices"); *Billard v. Rockwell Int'l Corp.*, 683 F.2d 51 (2d Cir. 1982) (affirming dismissal of complaint on the grounds that announcement of tender offer, prior to disclosure of favorable financial reports, is not a "manipulative device" because "[a]nnouncement of a genuine tender offer in no way creates an artificial impact on market activity"); *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308, 1313-16 (N.D. Ill. 1983) (granting motion to dismiss on the grounds that company A's granting company B an option to purchase several hundred thousand shares of company A stock to help company B obtain a majority of company A's stock and deter a competing tender offer for company A was not a "manipulative device"); *Cont'l Cas. Co. v. State of New York Mortgage Agency*, No. 94 C 1463, 1994 WL 532271, at *3-4 (N.D. Ill. Sept. 26, 1994) (granting motion to dismiss on the grounds that a "scheme" to

purchase mortgage loans supporting bond series, in violation of governing bond documents, is not a wash sale or any other type of "manipulative device"); *Kademian v. Ladish*, 792 F.2d 614 (7th Cir. 1986) (affirming dismissal of complaint on the grounds that president's efforts to maintain control of the company by entering into a merger with low bidder were neither "manipulative" nor "deceptive" acts); *Shamsi v. Dean Witter Reynolds, Inc.*, 743 F. Supp. 87, 91 (D. Mass. 1989) (dismissing § 10(b) and Rule 10b-5 claims alleging that a broker made unauthorized and unsuitable investments on the grounds that "such conduct is not deceptive").

In *Livent*, a case heavily relied on by Plaintiffs, the court dismissed a second amended securities fraud complaint where the plaintiffs alleged that an investment bank (CIBC) fraudulently disguised a loan to a company (Livent):

> While accepting that the Noteholders' description of this arrangement alleged what on its face appeared to be a fraudulent transaction involving CIBC and Livent, as set forth in the Second Amended Complaint, the Court found it insufficient to state a § 10(b) claim. . . . What this Court identified as lacking in the Noteholders' claim for the purposes of § 10(b) liability was a sufficient link between CIBC's alleged awareness and participation in Livent's fraudulent scheme, and *an actual public misrepresentation made by or attributed to CIBC in connection with the purchase or sale of securities on the basis of which the Noteholders made their investment decision.*

174 F. Supp. 2d at 147, 150 (emphasis added). Only when the plaintiffs amended their complaint to allege that the defendant investment bank improperly solicited and personally sold securities directly to the class representatives — an activity within the established categories of "manipulative" and "deceptive" acts — did the court uphold their complaint. *Id.* at 151.

None of JPMorgan Chase's alleged activities is "manipulative" or "deceptive" within the meaning of Section 10(b) and Rule 10b-5.[5] None constituted a wash sale, a matched sale, or any other effort to tamper directly with the price of Enron securities. None concerned insider trading, or the unauthorized sale of Plaintiffs' securities in breach of a fiduciary relationship. None involved a sale or purchase of securities to or from Plaintiffs within the applicable three-year statute of limitations.[6]

C. Only Acts Committed "In Connection With The Sale Or Purchase Of Any Security" Give Rise To Section 10(b) And Rule 10b-5 Liability

Beyond demonstrating a "manipulative" or "deceptive" act within the meaning of Section 10(b) and Rule 10b-5, a plaintiff bears the burden of showing that the "manipulative" or "deceptive" act was committed "*in connection with the purchase or sale of any security.*" 15 U.S.C. § 78j(b) (emphasis added). The "in connection with" requirement is met only if the purchase or sale of a security is integral to the "deceptive" or "manipulative" act. For example, in *Zandford*, the Supreme Court found actionable a broker's sale of his client's securities and subsequent misappropriation of the proceeds —

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[5] Through wholly conclusory allegations, the Complaint accuses JPMorgan Chase of:

- Lending money to Enron and Enron-related entities;
- Providing commodity swaps to Enron (the Mahonia transactions);
- Making a passive investment in an Enron-related partnership (LJM2);
- Working as one of the investment bankers in the proposed, but failed, Dynegy merger;
- Having a working relationship with Enron executives;
- Issuing credit default puts for Enron securities;
- Preparing analyst Research Notes containing opinions and recommendations based upon public information; and
- Underwriting Enron securities offerings more than three years ago.

[6] For the reasons discussed in Point II.B below, the analyst Research Notes are not "deceptive" under Section 10(b) and Rule 10b-5 because these notes contain nothing more than public information and inactionable opinion.

clearly "manipulative" and "deceptive" acts — only after also finding that the "in connection with" requirement had been met:

> The securities sales and respondent's fraudulent practices were not independent events. This is not a case in which, after a lawful transaction had been consummated, a broker decided to steal the proceeds and did so. Nor is it a case in which a thief simply invested the proceeds of a routine conversion in the stock market. Rather, respondent's fraud coincided with the sales themselves. Taking the allegations in the complaint as true, each sale was made to further respondent's fraudulent scheme.

122 S. Ct. at 1903-04.

Similarly, in *O'Hagan*, the Supreme Court held that trading on misappropriated information met the "in connection with" requirement because "[t]he securities transaction and the breach of duty coincide[d]." 521 U.S. at 656. The *O'Hagan* Court described the outer limits of the "in connection with" requirement:

> The misappropriation theory would not . . . apply to a case in which a person defrauded a bank into giving him a loan or embezzled cash from another, and then used the proceeds of the misdeed to purchase securities. In such a case, . . . the proceeds would have value to the malefactor apart from their use in a securities transaction, and the fraud would be complete as soon as the money was obtained.

Id. at 656-57 (internal quotations and citations omitted).

As *O'Hagan* and *Zandford* illustrate, "deceptive" and "manipulative" acts that are a step removed from the purchase or sale of a security do not meet the "in connection" with requirement of Section 10(b) and Rule 10b-5. *See, e.g., id.*. at 656 (noting that the "in connection with" requirement is not met where an embezzler subsequently "use[s] the proceeds of the misdeed to purchase securities").

None of JPMorgan Chase's activities meets the "in connection with" requirement. As detailed in the Complaint and Plaintiffs' Brief, not a single allegation against JPMorgan Chase directly involves the purchase or sale of a security. Each allegation, even if true, is at least one step removed from any securities transaction. The "in connection with" requirement has not been satisfied.

D. Plaintiffs' "Scheme" Allegations Do Not State A Claim For Securities Fraud

In asserting that "[n]otwithstanding *Central Bank,* primary liability may be based on participation in a scheme to defraud," Plaintiffs' Brief at 64, Plaintiffs conveniently overlook that *Central Bank* itself involved allegations of a "fraudulent scheme." In summarizing the *Central Bank* plaintiff's claims in the decision that was ultimately considered by Supreme Court, the Tenth Circuit described the allegations as centering on "bonds [] sold as part of a *fraudulent scheme*." *First Interstate Bank of Denver v. Pring*, 969 F.2d 891, 895 (10th Cir. 1992) (emphasis added), *rev'd*, 511 U.S. 164 (1994). By reversing the Tenth Circuit's decision and ordering the action dismissed, the Supreme Court expressly rejected the very arguments Plaintiffs advance here.

The infirmity of Plaintiffs' argument is further illustrated by the fact that post-*Central Bank* cases, including *Cooper v. Pickett*, 137 F.3d 616 (9th Cir. 1998), cited throughout Plaintiffs' Brief, have uniformly held that participating in a "scheme" to defraud — without individually committing a "manipulative" or "deceptive" act — does not constitute securities fraud. *See id.* at 624 (holding that "*Central Bank* does not preclude liability based on allegations that a group of defendants acted together to violate the securities laws, *as long as each defendant committed a manipulative or deceptive act in furtherance of the scheme.")* (emphasis added).

For example, in *In re Kendall Square Research Corporation Securities Litigation*, 868 F. Supp. 26 (D. Mass. 1994), the court rejected the plaintiffs' efforts to hold PriceWaterhouse Coopers liable for securities fraud for its participation in structuring improperly recognized transactions on behalf of a client:

> While participation in the 'structuring' of transactions may be evidence of PriceWaterhouse's knowledge at the time it provided its audit opinion, the participation in the 'structuring' does not constitute the making of a material misstatement; rather, it is the improper reporting of the 'structured' transactions by the Company in its quarterly statements that constitutes the alleged Section 10(b) violation.

Id. at 28 n.1. As was the case in *Kendall*, JPMorgan Chase's alleged participation in "structuring" the LJM2 partnership and commodity swaps that purportedly furthered Enron's "scheme" to project itself in a more positive financial light is not actionable under Section 10(b) and Rule 10b-5.[7] *See, e.g., In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 761 (N.D. Cal. 1997) (rejecting securities fraud claims where "[p]laintiffs' scheme allegations appear[ed] to be no more than a thinly disguised attempt to avoid the impact of the *Central Bank* decision") (internal quotations omitted); *In re SmartTalk Teleservices, Inc. Sec. Litig.*, 124 F. Supp. 2d 527, 547-48 (S.D. Ohio 2000) (noting that "'[s]cheme' theories of relief for securities fraud are limited because there is no longer aider or abettor civil liability in the securities fraud area."); *Lemmer v. Nu-Kote Holding, Inc.*, No. Civ. A. 398CV01612, 2001 WL 1112577, *7-8 (N.D. Tex. Sept. 6, 2001) (rejecting argument that "representations by [certain defendants] can be attributed to the other Defendants because the representations were issued as part of a scheme to

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[7] As discussed at pages 27-29 below, Plaintiffs plead no factual basis for their allegations regarding LJM2 and Mahonia.

defraud"); *Pegasus Holdings v. Veterinary Ctrs. of Am., Inc.*, 38 F. Supp. 2d 1158, 1164 (C.D. Cal. 1998) (holding that "[p]laintiffs alleged 'scheme' theory of liability is . . . fundamentally inconsistent with judicial interpretations of section 10(b)"); *Stack v. Lobo*, 903 F. Supp. 1361, 1374 (N.D. Cal. 1995) (affirming court's dismissal of "scheme" allegations because they were "no more than a thinly disguised attempt to avoid the impact of the *Central Bank* decision").[8]

The "scheme" theory of liability advanced by Plaintiffs — a theory that does not even require any agreement among its participants[9] — goes way beyond the "conspiracy" theory of securities fraud liability expressly rejected by the courts. *See Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin*, 135 F.3d 837, 843 (2d Cir. 1998) (holding that "[w]here the requirements for primary liability are not independently met, they may not be satisfied based solely on one's participation in a conspiracy in which *other parties* have committed a primary violation.") (emphasis in original); *In re Glenfed, Inc. Sec. Litig.*, 60 F.3d 591, 592 (9th Cir. 1995) (holding that "the Court's

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8 A minority of post-*Central Bank* decisions have held that a defendant can be liable under § 10(b) where he significantly participated or was "intricately involved" in making a material misstatement. *See, e.g., In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960, 970 (C.D. Cal. 1994); *Adam v. Silicon Valley Bancshares*, 884 F. Supp. 1398, 1401 (N.D. Cal. 1995). Even under this view, JPMorgan Chase cannot be liable under Section 10(b) because it did not in any way participate in the preparation of Enron's alleged misstatements of its financial affairs. *See ZZZZ*, 864 F. Supp. at 966 (accounting firm was "actively involved in the writing and reviewing of the [company's] financial reports and press releases provided to the public"); *Adam*, 884 F. Supp. 1398 (accounting firm audited allegedly misleading financial statements).

9 "Scheme to defraud and conspiracy liability theories, while they share some similarities, are separate and distinct liability theories and the elements of the two theories are not identical. Most significantly, a conspiracy requires an agreement and imposes liability based on the act of joining that agreement as well as on acts taken in furtherance of the conspiracy. A scheme to defraud, on the other hand, requires neither an agreement nor the joining of a scheme. . . ." Plaintiffs' Brief at 110 (internal citations and emphasis omitted).

rationale [in *Central Bank*] precludes a private right of action for 'conspiracy' liability."). Plaintiffs' scheme theory is not only unrecognized, but farcical. Plaintiffs contend that "a defendant may be liable for participating in a scheme even if it did not interact with all the other participants, was unaware of the identity of each of the other participants, did not know about the specific role of the other participants in the scheme, did not know about or participate in all of the details of each aspect of the scheme, or joined the scheme at a different time than the other participants." Plaintiffs' Brief at 109. Plaintiffs' "scheme" theory of liability effectively eliminates Section 10(b)'s scienter requirement: entities could be liable for securities fraud for participating in a "scheme" *that they did not even know existed.*

Finally, Plaintiffs' "scheme" theory of liability is expressly barred by *Central Bank*. As shown more fully on Exhibit A, Plaintiffs' "scheme" cases involved a separate "manipulative" or "deceptive" act on the part of the defendant(s), or pre-date *Central Bank*. For example, *Shores v. Sklar*, 647 F.2d 462 (5th Cir. 1981), a pre-*Central Bank* Fifth Circuit decision, found Section 10(b) and Rule 10b-5 "reach[ed] complex fraudulent schemes, as well as lesser misrepresentations or omissions," and "[l]awyers, underwriters, and accountants who participate in bond issues . . . with intent to deceive or defraud" could be held liable under Section 10(b)/Rule 10b-5, even if they did not themselves make a material misrepresentation or omission. *Id.* at 470-71.[10] *Shores* is

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[10] In holding that "scheme" liability exists under Rule 10b-5, the *Shores* court expressly noted that "[t]here is no Supreme Court precedent to the contrary." *Id.* at 471. Notwithstanding, the defendants in *Shores* themselves allegedly committed a separate "manipulative" or "deceptive" act within the meaning of Section 10(b): "the complaint alleged that the defendants had fabricated a *materially misleading Offering Circular* in order to induce the Industrial Development Board [ ] to issue, and the public to buy, fraudulently marketed bonds." *Id.* at 464 (emphasis added).

plainly no longer good law in light of *Central Bank*. *See also In re Cascade Int'l Sec. Litig.*, 840 F. Supp. 1558, 1581 (S.D. Fla. 1993) (declining to dismiss claims against securities broker who issued "substantially false sales brochures"), *reconsidered on other grounds*, 894 F. Supp. 437 (S.D. Fla. 1995); *Livent*, 174 F. Supp. 2d at 150 (investment bank made "an actual public misrepresentation . . . in connection with the purchase or sale of securities on the basis of which the Noteholders made their investment decision").

II. JPMorgan Chase Made No Actionable Misstatements

Neither the Complaint nor Plaintiffs' Brief contains any allegations, conclusory or otherwise, that JPMorgan Chase made any misstatements or omissions in its roles as lender, financing counterparty, passive investor, investment banker or issuer of credit-default puts for Enron debt securities. Instead, Plaintiffs' allegations of misstatements focus on (1) Registration Statements issued before the three-year statute of limitations period, and (2) analyst Research Notes that contain nothing more than the repetition of information contained in Enron's public statements and the analysts' own opinions. None of these items, each of which is discussed on Exhibit B, is an actionable misstatement.

A. Statements Made Before April 8, 1999 Are Outside The Statute Of Limitations And Should Be Disregarded

Although Plaintiffs appear to concede that they have no claim under the federal securities laws for any statement made before April 8, 1999, Plaintiffs' Brief at 44-45, they nonetheless digress several times to discuss a February 1999 Enron Registration Statement for an offering that JPMorgan Chase allegedly helped underwrite, as well as other purported JPMorgan Chase activities beyond the applicable three-year limitations period. *See, e.g.,* Plaintiffs' Brief at 21-22, 30, 47-48; Complaint ¶¶ 655, 662.

The law is well-settled, however, that "[l]itigation instituted pursuant to § 10(b) and Rule 10b-5 [ ] must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991); *see also* 15 U.S.C. § 77m; *Prieto v. John Hancock Mut. Life Ins. Co.*, 132 F. Supp. 2d 506, 512 (N.D. Tex. 2001) (same), *aff'd*, __ F.3d __ (5th Cir. 2002); *Columbraria Ltd. v. Pimienta*, 110 F. Supp. 2d 542, 548 (S.D. Tex. 2000) (same). Because JPMorgan Chase activities or statements predating April 8, 1999 are not actionable as a matter of law, the Complaint's allegations regarding such activities cannot support Plaintiffs' securities fraud claims and should be disregarded by the Court.

Plaintiffs' fallback argument — that these stale statements nonetheless have some evidentiary value — should similarly be rejected. Plaintiffs' Brief at 45 & n.29. Preliminarily, Plaintiffs are unable to cite any securities law authority to support their novel suggestion that allegations of pre-limitations period conduct can be pled to support a securities fraud claim. Instead, Plaintiffs rely on inapposite soundbites from cases considering claims that run the gamut from mail fraud to Title VII sexual harassment. *See United States v. Ashdown*, 509 F.2d 793 (5th Cir. 1975) (mail fraud); *United States v. Blosser*, 440 F.2d 697, 699 (10th Cir. 1971) (mail fraud); *Fitzgerald v. Henderson*, 251 F.3d 345, 365 (2d Cir. 2001) (Title VII), *cert. denied*, __ U.S.__, No. 01-373, 2002 WL 1306033 (June 17, 2002).

In any event, JPMorgan Chase's activities before April 8, 1999 do not save Plaintiffs' post-April 8, 1999 claims because these allegations also lack the requisite particularity. Referring to pre-April 1999 Registration Statements and Prospectuses, all

Plaintiffs allege is that JPMorgan Chase "acted as an underwriter," Complaint ¶ 655, for certain Enron offerings and that the offering documents contained false statements about Enron's financial condition. *See id.* ¶ 662. Such conclusions certainly do not satisfy the pleading requirements of Rule 9(b) and the Reform Act. *See BMC*, 183 F. Supp. 2d at 883 ("The PSLRA requires dismissal of allegations that lack a basis, *i.e.*, factual support."). Plaintiffs do not allege what statements attributable to JPMorgan Chase were false, how specifically the statements were false, who at JPMorgan Chase knew the statements were false, or what contemporaneous facts indicate that such statements were false. *See id.* at 887 ("There are no details as to what Defendants knew, when and how they knew it, and the basis for Plaintiffs' allegations. Nor does the amended complaint demonstrate that they knew their statements were false when made.").

B. The Analyst Research Notes Are Nothing More Than Opinions And The Regurgitation Of Publicly Available Information

Plaintiffs' Brief all but concedes that the 25 JPMorgan Chase Research Notes at issue contain nothing more than the inactionable repetition of the public statements of Enron and the analysts' personal opinions. *See* Plaintiffs' Brief at 79-80. Thus, there can be no liability under the securities laws for any of these alleged misstatements. *See In re Azurix Corp. Sec. Litig.*, 198 F. Supp. 2d 862, 880 (S.D. Tex. 2002) ("[A]n established and efficient market assimilates all of the available information regarding a particular stock, [and] sets the stock price accordingly"); *see also Kurtzman v. Compaq Computer Corp.*, Civ. Action No. H-99-779 *et. al.*, slip op. at 52 (S.D. Tex. Apr. 1, 2002) (Harmon, J.) (rejecting § 10(b) claim and noting that "[i]nvestors rely on facts in determining the value of a security, not mere expressions of optimism") (internal quotations and alterations omitted). To the extent Plaintiffs allege that JP Morgan Chase

is liable for omissions in its analyst reports rather than for misstatements, such liability is also precluded. JPMorgan Chase owed no duty to the general public. *See In re Oak Tech. Sec. Litig.*, No. 96-20552 SW, 1997 WL 448168, at *13 (N.D. Cal. Aug. 1, 1997) (dismissing complaint since underwriters of securities offerings could not be held liable to the general public for omissions in their analyst reports); *In Re Valence Tech. Sec. Litig.*, No. C 95-20459, 1996 WL 37788, at *9 (N.D. Cal. Jan. 23, 1996) (dismissing complaint since brokerage firm could not be held liable to general public for omissions in analyst reports).

In lieu of a legal argument, Plaintiffs' Brief consists of a 25-page reorganization and repleading of the JPMorgan Chase analyst allegations in the fashion they would presumably adopt if given the opportunity to file a Second Consolidated Complaint. This *de facto* amendment of the Complaint lists a string of block quotes from JPMorgan Chase Research Notes (all of which are plainly on their face repetitions of public information and opinions), contends that these Research Notes are false, and then provides a list of "true facts." Plaintiffs' Brief at 80-106. This does no more than highlight that no matter how many second or third chances they might get, Plaintiffs cannot state — with even a modicum of particularity — how each alleged JPMorgan Chase analyst Research Note was false when made, which individuals at JPMorgan Chase supposedly knew each Research Note was false, and how they allegedly knew it.

Plaintiffs' "laundry list" of alleged misstatements followed by supposedly "true but concealed facts" does not satisfy the Reform Act's pleading requirements. *See BMC*, 183 F. Supp. 2d at 886. A complaint structured in this manner does not permit analysis of each alleged misrepresentation on a statement-by-statement basis. *See* 15

U.S.C. § 78u-4(b)(1); *In re First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 887 (W.D.N.C. 2001); *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1129 (2d Cir. 1994). Moreover, Plaintiffs fail to identify any contemporaneous documents or other evidence known to JPMorgan Chase that contained such "true but concealed facts." This Court recently dismissed a complaint suffering from these very same deficiencies:

> Plaintiffs have merely lumped public statements by or about BMC into three smaller periods . . . and follow each with a laundry list of "true but concealed facts." They fail to show which of the statements are misrepresentations and to specify the reasons why they are false or misleading or how they relate to the "true but concealed facts."
> . . . [The complaint] does not refer to or cite any internal reports or documentation to support Plaintiffs' alleged "true but concealed facts," which lack sufficient indicia of reliability to satisfy the PSLRA.

BMC, 183 F. Supp. 2d at 886. The same conclusion should be reached here.

III. Plaintiffs' Brief Does Not Remedy The Complaint's Failure To Allege Scienter Adequately

Throwing all credibility out the window, Plaintiffs declare that JPMorgan Chase would have done *anything* to further integrate itself in Enron's ill-fated Ponzi scheme. Plaintiffs' Brief at 126. Rather than cash out of the doomed enterprise as its exposure increased, Plaintiffs claim — without any basis — that JPMorgan Chase knowingly upped the ante: "the increasing financial exposure of [JPMorgan Chase] to Enron . . . only increased the motive of the banks, like J.P. Morgan" to keep the alleged Enron Ponzi scheme afloat. *Id.* The case law unambiguously rejects such upside down logic: "Ponzi schemes are doomed to collapse, and while an individual may be able to escape with the proceeds of Ponzi scheme, a bank cannot. Thus, participation in the scheme would not appear to be in the banks' economic interest. The fact that the banks

stood to gain by . . . earning fees . . . does not support an inference of fraudulent intent on the part of the banks." *Schmidt v. Fleet Bank*, No. 96 Civ. 5030 (AGS), *et al.*, 1998 WL 47827, at *6 (S.D.N.Y. Feb. 4, 1998) (internal quotations omitted); *see also Ray v. General Motors Acceptance Corp.*, Civ. A. No. CV-92-5043 (DGT), 1995 WL 151852, at *5 (E.D.N.Y. Mar. 28, 1995) (rejecting as illogical a lender's alleged motive to continue a "Ponzi" scheme with the debtor since the lender "could not hope to recoup even a fraction of [its loans] through the continuation of the alleged 'ponzi scheme.'").

A. Plaintiffs' Scienter Arguments Are Conclusory And Legally Inadequate

Plaintiffs' Brief does not even attempt to refute the fatal defects in their scienter pleadings enumerated in JPMorgan Chase's Moving Brief. Thus, it is undisputed that:

- Conclusory allegations that JPMorgan Chase was privy to inside information about Enron's financial condition do not raise a "strong inference" of scienter;
- Conclusory allegations of JPMorgan Chase's motive and opportunity do not raise a "strong inference" of scienter as a matter of law;
- Conclusory allegations that JPMorgan Chase was motivated to commit fraud to collect fees and make a profit do not raise a "strong inference" of scienter; and
- Conclusory allegations that JPMorgan Chase analysts acquired the company's "collective knowledge" of facts contradicting the Research Notes do not raise a "strong inference" of scienter.

Moving Brief at 24-31.

As they do elsewhere in their response, Plaintiffs repackage their scienter allegations as scienter-by-association and hyperbole. Even as repled, however, these

allegations are insufficient under the Reform Act to satisfy the scienter requirement of Section 10(b) and Rule 10b-5.

For example, with respect to LJM2, the stunted centerpiece of their brief, Plaintiffs conclusorily allege that JPMorgan Chase "actually administered the LJM2 Partnership." Plaintiffs' Brief at 107; *see also* Complaint ¶ 27 (stating that CitiGroup and JPMorgan Chase administered LJM2). The Complaint lacks *any* factual support for this conclusory allegation. In fact, the LJM2 Private Placement Memorandum ("LJM2 PPM") — cited repeatedly in the Complaint and annexed to JPMorgan Chase's Appendix, which was filed with its Moving Brief[11] — *explicitly contradicts* these allegations.[12] The LJM2 PPM confirms JPMorgan Chase's passive investor status:

> **Passive Investment in Interests**
>
> Limited Partners [including JPMorgan Chase-related entities] will be relying entirely on the General Partner [an entity ultimately controlled by Andrew Fastow] and the Managers to conduct and manage the affairs of the Partnership. *The Agreement will not permit the Limited Partners to engage in the active management and affairs of the Partnership.* . . . [T]he Limited Partners must rely on the ability of the General Partner to make appropriate investments. . . .

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11 In reviewing a motion to dismiss a securities fraud claim, the Court may consider documents "integral to and explicitly relied on in the complaint." *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).

12 *See ALA Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 n.8 (3d Cir. 1994) ("Where there is a disparity between a written instrument annexed to a pleading and an allegation in the pleading based thereon, the written instrument will control."); *Graue Mill Dev. Corp. v. Colonial Bank & Trust Co. of Chicago*, 927 F.2d 988, 991 (7th Cir. 1991) ("Where the allegations of a pleading are inconsistent with the terms of a written contract attached as an exhibit, the terms of the latter, fairly construed, must prevail over the averments differing therefrom.") (internal quotations omitted).

LJM2 PPM at 30 (Appendix, Exhibit 3) (emphasis added).[13]

Plaintiffs' focus on the Mahonia transactions also does not solve their scienter problem. The Complaint and Plaintiffs' Brief reference natural gas forward contracts involving Enron, Enron Natural Gas Marketing Corp., Enron North America Corp., JPMorgan Chase and a Channel Islands company called Mahonia. *See* Plaintiffs' Brief at 51-53; Complaint ¶¶ 559-564, 664-668. Plaintiffs do not allege, nor could they, that the transactions themselves were illegal or illegitimate. Instead, the Complaint and Plaintiffs' Brief contend that *Enron* fraudulently accounted for these transactions on its books as commodity trades rather than loans. Neither the Complaint nor Plaintiffs' Brief contains any specific factual allegation that JPMorgan Chase participated in or knew how Enron and its accountants were treating these transactions. Without this essential allegation, there is nothing to link JPMorgan Chase to Enron's fraudulent reporting of otherwise legitimate commodity finance transactions.[14]

Ultimately, according to Plaintiffs, the fact that JPMorgan Chase did business with Enron should be enough to raise a "strong inference" of JPMorgan Chase's scienter. *See, e.g.*, Plaintiffs' Brief at 113 (erroneously suggesting that JPMorgan

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[13] The Complaint and Plaintiffs' Brief also misstate the nature of JPMorgan Chase's investment. While it is true that the entity now known as JPMorgan Chase (and its employees) invested a total of $25 million in LJM2, or some 6 percent of LJM2's aggregate capital commitment, *see* Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp. ("Powers Report") at 73 (available at http://news.findlaw.com/hdocs/docs/enron/sicreport/index.html); Complaint ¶ 652, the Complaint fails to note that this investment was divided until January 1, 2001 between separate J.P. Morgan and Chase entities. In total, there were approximately fifty limited LJM2 partners. *See* Powers Report at 73.

[14] Even if Plaintiffs could allege that JPMorgan Chase knew of the alleged fraudulent reporting, such conduct would, at most, constitute only inactionable aiding and abetting. *See* Point I.A above.

Chase's "acts themselves can show J.P. Morgan's knowledge"). These allegations of scienter-by-association plainly do not satisfy the Reform Act's particularity requirements. Plaintiffs do not identify a single individual at JPMorgan Chase with purported knowledge of Enron's alleged fraud. Without specific facts, Plaintiffs repetitively accuse JPMorgan Chase's unidentified "top executives" of involvement in a handful of Enron transactions, from which Plaintiffs *speculate* that the unidentified JPMorgan Chase executives must have known of Enron's alleged fraud.[15] Plaintiffs' Brief at 118-20. Courts around the country have repeatedly rejected such generalized allegations that corporate officers must have known of the alleged fraud. *See Melder v. Morris*, 27 F.3d 1097, 1103 (5th Cir. 1994); *see also City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1263-64 (10th Cir. 2001) ("Generalized imputations of knowledge do not suffice, regardless of defendants' positions within the company.") (internal quotations omitted); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 539 (3d Cir. 1999) (allegations that a defendant "must have known" a statement was false or misleading are inadequate to withstand Rule 9(b) and Reform Act scrutiny); *Maldonado v. Dominguez*, 137 F.3d 1, 10 (1st Cir. 1998) (allegations that defendants "must have known" about the risks to the company are "inadequate to withstand Rule 9(b) scrutiny").

Plaintiffs also do not identify a single piece of evidence, documentary or otherwise, received by anyone at JPMorgan Chase that provided JPMorgan Chase with knowledge of the alleged true but undisclosed facts. Instead, Plaintiffs contend that

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[15] Plaintiffs' Brief repeats the Complaint's only references to specific JPMorgan Chase personnel, but neither pleads any facts from which one can infer that either executive, Mark Shapiro or William Harrison, had knowledge of Enron's alleged fraud or that he himself acted fraudulently. *See* Moving Brief at 25; Complaint ¶¶ 667, 671.

JPMorgan Chase obtained unidentified and unspecified information concerning Enron's actual financial condition through generic "due diligence," and claim that unidentified persons at JPMorgan Chase had "constant access" to Enron's "top executives" in connection with its financing activities. Plaintiffs' Brief at 118-19. These are not the type of particularized facts needed to raise a "strong inference" of scienter. *See BMC*, 183 F. Supp. 2d at 885 (defendants "involvement in day-to-day management of BMC's business" insufficient to establish scienter); *see also Abrams v. Baker Hughes Inc.*, __ F.3d __, 2002 WL 1018944, at *6 (5th Cir. May 21, 2002) (plaintiffs fail to allege scienter because they "point to no specific internal or external report available at the time of the alleged misstatements that would contradict them").

B. Alleged Knowledge Of Enron's Financial Condition Cannot Be Imputed To JPMorgan Chase's Analysts

Aside from Plaintiffs' failure to plead scienter with the required particularity as to any JPMorgan Chase employee, their brief does not remedy the Complaint's failure to allege facts showing that any JPMorgan Chase analyst was privy to Enron's alleged fraud. Plaintiffs' reliance on *Cooper*, 137 F.3d at 628-29, is entirely misplaced because *Cooper* employed a pre-Reform Act, and therefore no longer applicable, scienter analysis. *See In re PETsMART, Inc. Sec. Litig.*, 61 F. Supp. 2d 982, 998 (D. Ariz. 1999) (addressing the court's holding in *Cooper* and noting "the court was applying pre-PSLRA standards . . . [its] holding . . . thus, cannot be reconciled with Congress' later instruction in § 78u-4(b)(2) that scienter be pleaded with particularity as to each 'defendant'"); *see also In re Peerless Sys., Corp. Sec. Litig.*, 182 F. Supp. 2d 982, 991 (S.D. Cal. 2002) (holding that "*Cooper*'s analysis of what is sufficient to plead [ ] fraud is inapplicable to this action, which is governed by the PSLRA").

Plaintiffs' unparticularized speculation and outright self-delusion that JPMorgan Chase analysts obtained knowledge from other parts of JPMorgan Chase (or even from different corporate entities) ignores the bank's legal obligation to maintain a "Chinese wall" to isolate its analysts from inside information. *See* 15 U.S.C § 78o(f). Because JPMorgan Chase is presumed to comply with this statutory requirement unless facts to the contrary are specifically pleaded, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (parties are presumed to adhere to legal requirements), the Complaint's unsupported allegation that JPMorgan Chase did not maintain the "Chinese wall" cannot withstand a motion to dismiss. *See* Shirli F. Weiss, *Securities Analysts in Securities Class Actions*, 1136 PLI/Corp 431, 447-48 (1999) ("Plaintffs should be required to plead specific facts showing that the research analyst was brought 'over the wall' or otherwise was given the specific liability-triggering information allegedly obtained by the firm's investment banking division."). Plaintiffs proffer not one detail as to when this Chinese Wall was allegedly breached, who was allegedly involved in the breach, or what Enron information was allegedly conveyed when it was breached.

Plaintiffs' misguided reliance on the "collective knowledge" doctrine, Plaintiffs' Brief at 119-23, does not substitute for pleading scienter. The "collective knowledge" doctrine is the basic agency principle that knowledge obtained by an employee within the scope of his employment is knowledge of the *corporate entity*. *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987). The doctrine does not stand for the proposition that the knowledge of one employee within a company is imputed to another employee of the company (let alone to employees of a completely different company), as Plaintiffs assert. Indeed, the Reform Act expressly prohibits

Plaintiffs' attempt to plead scienter by alleging that knowledge is imputed to an individual. *See City of Philadelphia*, 264 F.3d at 1263-64 ("Generalized imputations of knowledge do not suffice, regardless of defendants' positions within the company.") (internal quotations omitted); *Advanta*, 180 F.3d at 539 (same).

Moreover, Plaintiffs continue to disregard that J.P. Morgan, whose affiliate J.P. Morgan Securities, Inc. issued the analyst Research Notes, and Chase, whose affiliate The Chase Manhattan Bank provided Enron with financial services, were completely separate and unrelated corporations until January 1, 2001. *See* J.P. Morgan Chase & Co., Inc. Form 10-K, March 22, 2002, at page 1 (Appendix, Exhibit 1). Even placing aside the faulty legal theories and conclusory factual statements advanced by Plaintiffs, the purported knowledge of the Chase entities could not possible be inputed to the J.P. Morgan entities prior to January 1, 2001.

IV. The Texas State Law Claim Should Be Dismissed Because Plaintiffs Do Not Allege That The Securities Were Sold In Texas

Plaintiffs concede that no aspect of the sale of the $250 million of 6.95% Notes due July 15, 2028 and $250 million of 6.40% Notes due on July 15, 2006 (the "Notes") at issue with respect to the Texas Securities law claim occurred in Texas: neither the alleged purchaser of the Notes (the Washington State Investment Board) nor the underwriters (JPMorgan Chase and Lehman Brothers) are Texas entities. Plaintiffs argue that the Texas Securities Act nevertheless applies to the sale on the grounds that the securities issuer (Enron), its lawyers (Vinson & Elkins), and its accountants (Arthur Andersen) were all based in Texas. In so arguing, Plaintiffs ignore the authority cited in JPMorgan Chase & Co.'s Moving Brief holding that only the contacts of the seller and purchaser of the securities — and not the issuer — are relevant in determining whether

the application of a state's blue sky laws is proper. *See In re Revco Sec. Litig.*, No. 89CV593, 1991 WL 353385, at *14 (N.D. Ohio Dec. 12, 1991) (finding that the plaintiff had "failed to allege a sufficient nexus between the sale of the debt/securities and Ohio" where only the issuer of the securities had "significant business ties with Ohio").

Instead, Plaintiffs criticize JPMorgan Chase for "cit[ing] no *Texas* authority for the proposition that the Texas securities laws should not apply in circumstances such as those presented here." Plaintiffs' Brief at 129 (emphasis added). Plaintiffs attempt to dispose of the issue by simply contending that Texas courts (none of which were faced with facts similar to those alleged here) have generally afforded the Texas Securities Act "the widest possible scope." Plaintiffs' Brief at 130 (internal quotation omitted). The Texas decisions Plaintiffs cite are neither on point nor authoritative. As the Fifth Circuit has explained:

> If the state has purported to exercise jurisdiction over [a] foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. *This is a federal question and, of course, the state authorities are not controlling.*

Rosenthal v. Frankfort Distillers Corp., 193 F.2d 137, 141 (5th Cir. 1951) (emphasis added and internal citations omitted); *see also Systems Contractors Corp. v. Orleans Parish Sch. Bd.*, 148 F.3d 571, 575 n.23 (5th Cir. 1998) (holding that the Louisiana Supreme Court's interpretation of the procedural due process clause is not controlling, because while "state courts have the authority to decide issues of federal constitutional law, state court decisions are not binding upon the federal courts"); *Gratham v. Avondale Indus. Inc.*, 964 F.2d 471, 473 (5th Cir. 1992) ("It is beyond cavil that we are not bound by a state court's interpretation of federal law regardless of whether our jurisdiction is

based on diversity of citizenship or a federal question."); *Kansas City Structural Steel Co. v. State of Arkansas*, 269 U.S. 148, 150 (1925) (holding that an Arkansas Supreme Court decision is not controlling on the issue of "whether the state enactments as applied are repugnant to the commerce clause").

The law is well-settled that "[t]he Commerce Clause [of the United States Constitution] precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43 (1982). Because the sale of the Notes at issue took place wholly outside Texas, application of the Texas Securities Act to these transactions would violate the Commerce Clause of the federal constitution. Plaintiffs' Texas Securities Act claim must accordingly be dismissed.

V. The Complaint Should Be Dismissed Without Leave To Replead

By exceeding the allegations pled in their Complaint,[16] Plaintiffs' Brief has shown the Court what they would do if given leave to replead. Between their 500+ page Complaint and their 134-page opposition brief, Plaintiffs have advanced every conceivable "fact," theory, and fabrication regarding JPMorgan Chase's alleged participation in Enron's securities fraud. Plaintiffs' allegations, though exhausting, do not state a single legally cognizable claim under Section 10(b) and Rule 10b-5. As even the *Tittle* Plaintiffs admit, the alleged conduct of the investment banks "is simply not

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16 For example, Plaintiffs' Brief claims for the first time that "J.P. Morgan's top executives . . . put[] up $3.75 million *before* LJM2 was fully formed or funded," an allegation with no apparent relevance to Plaintiffs' claims. Plaintiffs' Brief at 113 (emphasis in original). *See also id.* at 12, 38, 54, 107. Plaintiffs' Brief also for the first time alleges an entirely unsubstantiated "payoff" of $120 million a year in association with the Mahonia transactions. *Id.* at 53, 106. These are just two of a number of instances in which Plaintiffs' Brief exceeds the scope of their Complaint.

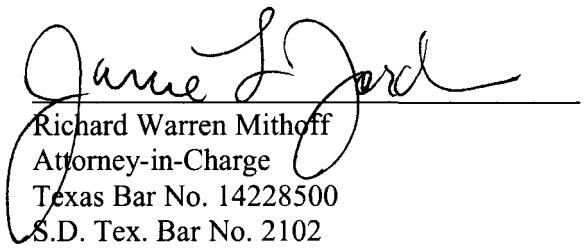
actionable securities fraud by the *Tittle* plaintiffs or by any other Enron investor pursuant to *Central Bank*." *Tittle* Plaintiffs' Memorandum In Opposition To Defendants' Motions To Dismiss Civil RICO Claims at 95. Because Plaintiffs' "legal theory is [fundamentally] untenable," "no legitimate purpose is to be served by permitting Plaintiff[s] to amend." *Special Situations Fund III, L.L.P. v. ViaGrafix Corp.*, No. Civ. A. 3:98-CV-1216-M, 2001 WL 182666, at *2 (N.D. Tex. Jan. 22, 2001).

CONCLUSION

For the foregoing reasons and for the reasons stated more fully in JPMorgan Chase's Moving Brief, Plaintiffs' claims against JPMorgan Chase should be dismissed in their entirety with prejudice and without leave to replead.

Dated: Houston, Texas
June 24, 2002

Respectfully submitted,



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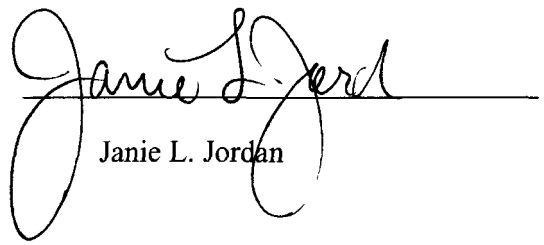
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by electronic mail, pursuant to this Court's Order, upon the following counsel of record on this 24th day of June, 2002.



Janie L. Jordan

Exhibit A

Inapposite Cases Cited By Plaintiffs In Response To JPMorgan Chase's Motion To Dismiss

Cases	Referenced in Plaintiffs' Brief at Page(s):	Primary Distinctions
Aaron v. SEC, 446 U.S. 680 (1980)	33, 59, 66, 70	• Pre-*Central Bank.* • Pre-PSLRA. • SEC enforcement action. • Defendants made misleading statements in promoting securities.
Adam v. Silicon Valley Bancshares, 884 F. Supp. 1398 (N.D. Cal. 1995)	61,70, 109, 110	• Pre-PSLRA. • Accountant defendants audited misleading financial statements.
Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972)	*Passim*	• Pre-*Central Bank.* • Pre-PSLRA. • Defendants encouraged Native Americans to sell their stock at below-market prices, without disclosing the fact that defendants stood to profit from such sales.
Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975)	68, 109	• Pre-*Central Bank.* • Pre-PSLRA. • Accountant defendants audited misleading financial statements.
Competitive Assocs., Inc. v. Laventhol, Krekstein, Horwath and Horwath, 516 F.2d 811 (2d Cir. 1975)	33-34, 68, 71	• Pre-*Central Bank.* • Pre-PSLRA. • Accountant defendants audited misleading financial statements.
Cooper v. Pickett, 137 F.3d 616 (9th Cir. 1998)	*Passim*	• Pre-PSLRA. • Analyst defendants published inaccurate information received from non-public sources.
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)	33	• Pre-*Central Bank.* • Pre-PSLRA. • Accountant defendants audited misleading financial statements.
Finkel v. Docutel/Olivetti Corp., 817 F.2d 356 (5th Cir. 1987)	34, 59	• Pre-*Central Bank.* • Pre-PSLRA. • Company did not disclose the fact that its controlling shareholder forced it to purchase worthless inventories, resulting in a write-down of over ten million dollars.
Flecker v. Hollywood Entm't Corp., 1997 WL 269488 (D. Or. Feb. 12 1997)	41, 75-76	• Defendants prepared misleading offering documents.

Cases	Referenced in Plaintiffs' Brief at Page(s):	Primary Distinctions
Harris v. United States, 48 F.2d 771 (9th Cir. 1931)	71	• Does not involve § 10(b) or Rule 10b-5. • Pre-*Central Bank*. • Pre-PSLRA. • Criminal case. • Defendants traded in company securities to create the appearance of an actual market for the company's securities, thus artificially inflating the price of the securities.
Heller v. Am. Indus. Props. REIT, Civ. No. SA-97CA1315EP, 1998 WL 1782550 (W.D. Tex. Sept. 28, 1998)	60	• § 10(b)/Rule 10b-5 claim dismissed with prejudice. • Defendants merged four limited partnerships to create an entity in which the stockholders were relegated to minority status.
Hill v. Hanover Energy, Inc., Civ. A. No. 91-1964 (JHG), 1991 WL 285295 (D.D.C. Dec. 16, 1991)	69	• Pre-*Central Bank*. • Pre-PSLRA. • Defendant defrauded co-investors in gas company out of their share of the gas company's securities.
In re Cascade Int'l Sec. Litig., 840 F. Supp. 1558 (S.D. Fla. 1993), *reconsidered on other grounds*, 894 F. Supp. 437 (S.D. Fla. 1995)	41, 76-77	• Pre-*Central Bank*. • Pre-PSLRA. • Broker defendant issued misleading sales brochures.
In re Health Mgmt. Inc. Sec. Litig., 970 F. Supp. 192 (E.D.N.Y. 1997)	61, 109	• Accountant defendants audited misleading financial statements.
In re Landry's Seafood Restaurant, Inc. Sec. Litig., No. H-99-1948 *et. al.*, slip op. (S.D. Tex. Feb. 20, 2001)	*Passim*	• Defendants prepared both misleading offering documents and research reports.
In re Livent, Inc. Noteholders Sec. Litig., 174 F. Supp. 2d 144 (S.D.N.Y. 2001)	*Passim*	• Investment bank defendant sold company's securities without disclosing material adverse financial information.
In re Sec. Litig. BMC Software, Inc., 183 F. Supp. 2d 860 (S.D. Tex. 2001)	*Passim*	• § 10(b)/Rule 10b-5 claim dismissed with prejudice. • Defendants made misleading statements regarding company's business prospects and engaged in insider trading.
In re Software Toolworks Inc. Sec. Litig., 50 F.3d 615 (9th Cir. 1995)	76, 110	• Pre-PSLRA. • Defendants prepared misleading offering documents, and accountant defendants audited misleading financial statements.
In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 676 F. Supp. 458 (S.D.N.Y. 1987)	70	• Pre-*Central Bank*. • Pre-PSLRA. • Defendant prepared misleading financial projections that company publicly disseminated.

Cases	Referenced in Plaintiffs' Brief at Page(s):	Primary Distinctions
In re Waste Mgmt., Inc. Sec. Litig., Civ. No. H-99-2183, *et. al.*, slip op. (S.D. Tex. Aug. 16, 2001)	36, 63	• Defendants made misleading statements regarding the benefits of a merger and the company's financial condition, and engaged in insider trading.
In re ZZZZ Best Sec. Litig., 864 F. Supp. 960 (C.D. Cal. 1994)	*Passim*	• Pre-PSLRA. • Accountant defendants audited misleading financial statements.
Lipton v. Documation, Inc., 734 F.2d 740 (11th Cir. 1984)	71	• Pre-*Central Bank.* • Pre-PSLRA. • Defendants issued misleading financial statements.
McNamara v. Bre-X-Minerals Ltd., 197 F. Supp. 2d 622 (E.D. Tex. 2001)	41, 77	• Financial advisor defendants, with alleged access to contradictory inside information, made misleading statements regarding quantity of precious metals available at mining site.
Meason v. Bank of Miami, 652 F.2d 542 (5th Cir. 1981)	37, 63, 64	• Pre-*Central Bank.* • Pre-PSLRA. • Defendants sold fraudulent certificates of deposit to plaintiffs.
Murphy v. Hollywood Entm't Corp., No. Civ. 95-1926-MA (LEAD), 1996 WL 393662 (D. Or. May 9, 1996)	41, 75, 106	• Defendants drafted misleading offering documents.
Paul F. Newton & Co. v. Texas Commerce Bank, 630 F.2d 1111 (5th Cir. 1980)	37, 64	• Pre-*Central Bank.* • Pre-PSLRA. • Broker acting as market maker for company's stock artificially inflated the value of company's stock.
Richardson v. MacArthur, 451 F.2d 35 (10th Cir. 1971)	68, 107	• Pre-*Central Bank.* • Pre-PSLRA. • Defendant sold securities to plaintiff and then defrauded plaintiff of these same securities.
SEC v. First Jersey Secs., Inc. 101 F.3d 1450 (2d Cir. 1996)	*Passim*	• SEC enforcement action. • Broker sold securities at excessive markups.
SEC v. National Bankers Life Ins. Co., 324 F. Supp. 189 (N.D. Tex. 1971), *aff'd*, 448 F.2d 652 (5th Cir. 1971)	110-112	• Pre-*Central Bank.* • Pre-PSLRA. • SEC enforcement action. • Defendant quoted artificial prices for company's stock and purchased large blocks of company's stocks using co-conspirator's funds in order to inflate the value of company's stock.

Cases	Referenced in Plaintiffs' Brief at Page(s):	Primary Distinctions
SEC v. Seaboard Corp., 677 F.2d 1301 (9th Cir. 1982)	68	• Pre-*Central Bank.* • Pre-PSLRA. • SEC enforcement action. • Accounting defendant audited misleading financial statements.
SEC v. U.S. Envtl., Inc., 155 F.3d 107 (2d Cir. 1998)	41, 77	• SEC enforcement action. • Defendants traded in company securities to create the appearance of an actual market for the company's securities, thus artificially inflating the price of the securities.
Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974)	111	• Pre-*Central Bank.* • Pre-PSLRA. • Defendant artificially depressed the value of the company's stock and issued a misleading proxy statement, resulting in company entering into a merger based on improper stock value.
Scholnick v. Cont'l Bank, 752 F. Supp. 1317 (E.D. Mich. 1990)	41, 77	• Pre-*Central Bank.* • Pre-PSLRA. • Bank defendant accepted proceeds of securities sales, preventing proceeds from being used for their advertised purpose of exploring oil wells.
SEC v. Zandford, ___ U.S. ___, 122 S.Ct. 1899, 2002 U.S. LEXIS 4023, 2002 WL 115596 (June 3, 2002)	36, 63	• Broker sold clients' securities and misappropriated the proceeds.
Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981)	*Passim*	• Pre-*Central Bank.* • Pre-PSLRA. • Defendant issued misleading offering circular.
Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971)	*Passim*	• Pre-*Central Bank.* • Pre-PSLRA. • Defendant purchased securities from insurance company using insurance company's own assets.
United States v. O'Hagan, 521 U.S. 642 (1997)	*Passim*	• Defendants traded on misappropriated confidential information.

Exhibit B

In addition to Plaintiffs' failure to plead scienter adequately and facts showing that any statement by JP Morgan Chase's analysts was false at the time the Research Notes were issued, none of the alleged misstatements set out in the Complaint is actionable as a matter of law for the following reasons.[1]

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
153	**June 9, 1999 Company Update:** "*We see*[2] no other company in our universe that offers such impressive, sustainable, and controlled growth as Enron. Enron's core strengths include . . . financial expertise, technological know-how. . . . In short, the company has the necessary skill-set to compete and win in the global marketplace . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Its portfolio offers global exposure that is almost entirely in lower-risk energy and infrastructure projects and is managed for superior risk adjusted returns. And, most important, it boasts a management team that is capable, deep, and supported by an enviable pool of talent."	• Inactionable opinion based on publicly available information.
	Enron's new businesses "offer numerous operating and financial synergies and showcase Enron's culture — a culture that is aggressive and opportunistic, yet knows how to manage and mitigate risk."	• Inactionable opinion based on publicly available information.
172	**September 23, 1999 Research Note:** "This is the first of ENE's proposed billion dollar energy services contracts and certainly not the last . . . We are reiterating our Buy recommendation . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
190	**November 26, 1999 Research Note:** "*In our opinion* the recent price weakness is unwarranted and presents a superb opportunity to get into one of our top growth names."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Enron has a virtually unassailable lead in the domestic wholesale energy markets."	• Inactionable opinion based on publicly available information.

[1] The Complaint's listing at paragraph 663 of alleged JPMorgan Chase Research Notes includes four — dated July 15, 1999, June 15, 2001, July 10, 2001 and November 2, 2001 — that are not otherwise referred to in the Complaint and that do not, in fact, exist. The Complaint also erroneously lists the July 25, 2000 Research Note as July 24, 2001, the March 22, 2001 Research Note as March 23, 2001, and the October 30, 2001 Research Note as October 20, 2001.

[2] Emphasis added here and in other entries in this Exhibit B to show language indicative of the analyst's opinion or repetition of Company's opinion.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
190 (cont.)	**November 26, 1999 Research Note (cont.):** "Retail business continues to thrive . . . "	• Inactionable opinion based on publicly available information. • Inactionable vague statement.
	"The speculation continues to be wrong and Enron continues to be right. The stock has been plagued by a litany of unsubstantiated reports. Just over the past few months there was speculation of a crisis at Enron India, . . . and most recently of Enron Energy Services losing money and facing deteriorating margins."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Future looks bright . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable vague statement
204	**January 21, 2000 Research Note:** "We are reiterating our BUY recommendation on Enron and raising our 12-month price target to $85 . . . *Our continued optimism* in Enron is fueled by the tangible and exciting prospects within the Communications business that the company unveiled at its analyst meeting yesterday ..."	• Inactionable opinion based on publicly available information. • Inactionable expressions of optimism.
	"Enron Broadband Services is the New Jewel in Enron's Portfolio . . . Enron Broadband Services (EBS) is well underway in executing its three prong approach."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Enron is unquestionably the pioneer in this market and is already executing on this strategy. Bandwidth is being traded, content is being delivered and the Enron Intelligent Network enables all of this. The market opportunity is enormous with bandwidth trading and broadband delivery *estimated* to reach $70 and $25 billion, respectively, by 2004."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"The retail business *plans* to double its contract volume in 2000 to $16 billion, delivering a $150 million swing to profitability."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
211	**February 9, 2000 Research Note:** "Today, *we believe* that Enron Broadband Services (EBS) offers an opportunity that may ultimately create more value than Enron's entire energy business portfolio."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"*We believe* that at no point did Enron's energy business enjoy such sound prospects both domestically and international [sic], across the retail and wholesale sectors ... *We forecast* 20% EPS growth . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
234	**May 3, 2000 Research Note:** "*We are confident* that Bandwidth Trading will revolutionize the broadband telecommunications industry."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"EBS Has Already Achieved Over 80% of its Year-End Transaction Goal."	• Inactionable repetition of publicly available information.
234	**May 15, 2000 Research Note:** "[W]e are revising our target price on Enron from $85 to $105 . . . *[W]e now view* the bandwidth trading market to be larger than originally estimated, and of more value to Enron."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Our original estimates pegged the Bandwidth Intermediation market reaching $100 billion in 2009. *We now expect* it to reach that milestone in 2004 . . . *We now see* margins reaching 3-4% in 2003, whereas previously *we believed* that would not take place before 2005 "	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
239	**July 3, 2000 Research Note:** "*We believe* the fundamentals for the stock are solid . . ."	• Inactionable opinion based on publicly available information. • Inactionable vague statement.
	"Enron continues to exceed targets for both its energy and telecommunications businesses, and *we have the utmost confidence* in its ability to execute on both its short- and long-term agendas . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"We reiterate our Buy on Enron (ENE) with a target price of $105."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
242	**July 19, 2000 Research Note:** "Enron announced a major deal with Blockbuster . . .that represents . . .an endorsement of its content delivery business . . .*We believe* that content delivery represents Enron's 'killer app' in the broadband world, and in addition to growing revenues, this deal and others like it will provide more visibility to its broadband technology and capabilities." "Enron's Intelligent Network technology makes it one of the only providers capable of providing mass-market content with speed, quality, scale and reliability. EBS will encode and stream the entertainment over its broadband network ... and deliver unparalleled quality of service. Thanks to its network architecture, software intelligence, and network control technology, Enron Broadband Services is one of the only games in town when choosing a high-quality, reliable, and scalable content provider. *In our view*, this deal is a great endorsement of its capabilities." "We reiterate our Buy rating on Enron with a target price of $105."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
248	**July 25, 2000 Research Note:** "Yesterday's earnings and business unit performances were more convincing evidence that Enron is the 'best-in-class' in this sector, and we reiterate our Buy rating with a $105 price target. All of its businesses are doing a superb job of maximizing market opportunities, growing market share, and maintaining very strong growth rates. Great fundamentals and competitive advantage continue to improve Enron's performance, and its superior execution *should continue* to differentiate the company from its peers." "Enron Broadband Services bandwidth trading and content delivery are all ahead of schedule, and *should provide* an excellent growth vehicle alongside its core energy businesses . . .EBS is not just a high growth earnings vehicle, but represents a paradigm shift in the way businesses will begin to outsource their telecom and risk-management needs and demand telecom pricing to properly reflect usage." "EBS's initial performance targets now seem grossly conservative, and *we are confident* that Enron will consistently tear through them during 2H00 . . .Notable is an exclusive, 20-year contract with Blockbuster to stream on-demand movies. It represents a fundamental shift in both the telecommunications and entertainment industries, and *we believe* more deals like it will follow." "Retail Energy Services continues hypergrowth . . .Enron is *on track* to reach a year-end contracting target of $16B. It logged $3.8B of new contracts last quarter, and *should continue* to ramp up revenues throughout the rest of the year."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable vague statement.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
256	**September 15, 2000 Research Note:** Rates Enron a "Buy," increases its target price to $115 and increases Enron's forecasted 00, 01 and 02 EPS of $1.41, $1.69 and $2.00.	• Inactionable opinion based on publicly available information. • Inactionable expressions of optimism.
	"We are raising *our estimates* and target price for Enron based on excellent continued fundamentals moving forward into 2001-02. A new target price of $115 . . . is the result of an increased 2002 EPS estimate of $2.00 . . . *We believe* this number is still conservative . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Enron's Retail business has turned the corner on profitability, and *should continue* to amass market share and enjoy its operating leverage. Enron has done a great job of collecting a portfolio of large, multi-year contracts . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
260	**September 27, 2000 Research Note:** "We reiterate our Buy on Enron with our $115 price target, as Enron continues to justify *our confidence* that its new businesses will mimic its track record of growth of its energy businesses . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"*[W]e continue to see* warranted upside from its current price in the mid-80s."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
284	**January 26, 2001 Research Note:** "The main take-away from its 2001 Investor Meeting yesterday was the *expectation* of another year of 15-20% EPS growth. *Management believes* the company will continue to remain in the 'sweet spot' of its growing wholesale and retail energy businesses, and its developing businesses will continue to gain critical mass and momentum."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"The results of its beta test for the Blockbuster/VOD product have been very positive. The systems, hardware and software for the product have been fully developed, and operationally the product performs well."	• Inactionable opinion based on publicly available information.
	"Bandwidth Intermediation. Enron had successfully delivered on its promise to ink 5,000 DS3 months worth of contracts in 2000. In 2001, the *company believes* it can deliver nearly three times this number."	• Inactionable opinion based on publicly available information.
	"Retail Energy Services. Retail Energy Services enjoyed its first full year of profitability . . .Enron *expects* the unit to be able to double its current contract portfolio size (from $16.1 billion today to over $30 billion in 2001)."	• Inactionable opinion based on publicly available information.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
302	**March 12, 2001 Research Note:** "*We view* the termination of the Enron/Blockbuster deal as a mild negative . . ."	• Inactionable opinion based on publicly available information.
	"We are not guiding down our numbers at this point because *we feel* that the content-delivery story still remains the same. Enron *will most likely* be able to shop its technology around and ink another $1 billion worth of contracts in 2001. In addition, the content volumes *anticipated* under the 20-year Blockbuster deal *will most likely* be picked up with another provider, now that Enron can shop around."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
306	**March 13, 2001 Research Note:** "*We view* yesterday's sell-off in response to a dissolved Blockbuster deal as overdone, and *see* a buying opportunity at these levels. We reiterate our Buy with a $120 price target . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"*We believe* that Enron is undervalued at these levels . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Enron is still the delivery technology 'arms dealer' to the content providers of the world . . .The deal was not terminated because the technology doesn't work . . ."	• Inactionable repetition of publicly available information.
310	**March 22, 2001 Research Note:** "*We firmly believe* that the Enron story is fully intact and *remain confident* that the only earnings risk is to the upside. We reiterate our Buy recommendation and our target price of . . .$120 . . .for Enron Corp . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Enron has developed a better mousetrap of a business model, and *we continue to believe* that it should be rewarded for it . . .Earnings visibility and competitive positioning have continually improved over . . .time."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Broadband concerns are overblown, underscoring the efficiency of the business model."	• Inactionable opinion based on publicly available information.
	"Our *best estimate* for the 8.3% drop yesterday is Enron's confirmation that it would redeploy 200-250 employees at its Enron Broadband unit. The *company and market sources confirm* that Bandwidth Intermediation is taking off and liquidity in trading capacity is building up quickly. Enron said that the bulk of the displaced employees are the result of either consolidating its locations (Portland, Oregon and Houston) or from Broadband businesses other than Intermediation and Content Delivery, which remain solidly *on track*. The dissolution of the Blockbuster exclusivity is a very minor issue and is in no way a harbinger of Content Delivery woes."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable vague statement.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
320	**April 18, 2001 Research Note:** "Broadband services is growing, albeit a slower pace due to customer's capital issues and economic climate." "*We believe* this is of little consequence to [EBS's] development, however, since the businesses have met or exceeded profitability and performance targets internally. We recently talked to management regarding the business, and *felt comfortable* they were getting adequate traction with customers and the interest for its bandwidth intermediation services exists. On the content side, *it seems* that management is more than satisfied with business development post-Blockbuster, as they have access to twice as much content as they did during the agreement. The stumbling block *it seems* is not technology . . ."	• Inactionable opinion based on publicly available information. • Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
325	**May 18, 2001 Research Note:** "The company has consistently delivered growth in its scale, reach, products and capabilities across both the Energy and other sectors. *We strongly believe* that Enron will continue to deliver, and *don't view* some persistent negative news flows as capable of derailing strong performances by its businesses as a whole. We reiterate our Buy rating and $120 12-month price target." "Enron's fortunes have certainly not peaked . . . *[W]e believe* the earnings power of the company continues to grow . . . *[W]e are very confident* that Enron is *on track*."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable vague statement.
333	**July 12, 2001 Analyst's e-mail to investors:** "Earnings release very positive; Reiterate Buy for ENE" "Wholesale marketing and trading: Very positive news from this segment, which continues to drive growth for the company . . ." "In addition, the company has reiterated guidance for 2001, and raised guidance for 2002 up to $2.15 per share."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable repetition of publicly available information.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
348	**August 15, 2001 Research Note:** "CEO Jeff Skilling Resigns; A Negative But Not Deleterious; Reiterate Buy"	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"Former CEO Jeff Skilling resigned abruptly yesterday for personal reasons"	• Inactionable repetition of publicly available information.
	"While we are quite surprised and disappointed about Mr. Skilling's decision to leave the company, *we believe* that Enron has the deepest management 'bench' in our universe. In addition, *we also feel confident* that Enron's transformation to an information and logistics company is well underway . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"We reiterate our Buy on Enron, and *believe* that upcoming catalysts will provide further clarity on Enron's earnings sustainability."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
352	**August 17, 2001 Research Note:** "Meeting with senior management *has reaffirmed our confidence* in Enron staying the course strategically."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"We reiterate our Buy rating on Enron following a meeting with senior management last night. We are maintaining our target price of $90 . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"*[W]e continue to believe* that fundamentally the company is better positioned today than it has ever been."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
363	**October 9, 2001 Research Note:** Increases Enron's rating to "Top Pick."	• Inactionable expression of optimism. • Inactionable vague statement.
	"*We see* Enron as our 'Focus List' pick, our best buy in the space"	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism. • Inactionable vague statement.
	"Over the next six months, *we expect* the stock to appreciate . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"*We see* Enron as very well positioned to deliver 20% earnings growth over the next 3-5 years . . ."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"*[W]e are confident* that Enron will continue to deliver on its promise of increasing returns on capital, greater transparency and sustainability of earnings growth."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
373	**October 17, 2001 Research Note:** "Enron released strong third quarter results yesterday, with solid volume growth across all commodities and regions."	• Inactionable opinion based on publicly available information.
	"Its successes with Europe and Other Commodities was especially positive, as *we believe* this now separate unit will provide an excellent earnings growth engine for the company."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"[I]ts debt rating of investment grade — will *most likely not* be tripped, as Enron's ratings were reaffirmed by Fitch and Standard and Poor's. Moody's has put the company on credit watch, but ENE would have to slip two ratings levels in order to fall below investment grade."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"The important take away is that Enron's earnings are supported by its cash flow, and are certainly sustainable."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
376	**October 20, 2001 Research Note:** "Enron continues to underperform in the capital markets, but there is scant evidence of business impairment."	• Inactionable opinion based on publicly available information.
	"Liquidity, especially short-term, is not an issue, *in our view*."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"*We see* ample liquidity in the near- to medium-term."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
380	**October 23, 2001 Research Note:** "*We continue to believe* this is a crisis of perception that Enron can address through further clarity and transparency."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
	"A Securities Exchange Commission (SEC) inquiry has begun, further contributing to weakness of the stock. It is important to note that this inquiry does not suggest that the SEC is accusing Enron of any particular securities violations. The only silver lining to this situation is that Enron was always acutely aware of the appearance of impropriety. It had gone to great lengths to assure that all transactions were properly reviewed, supported through fairness opinion, outside counsel opinions, etc. Because of that, *we believe* that the inquiry will be concluded relatively quickly."	• Inactionable opinion based on publicly available information. • Inactionable expression of optimism.
48, 655	**October 1997[3] issue of $100 million 6-5/8% Enron Notes:** Plaintiffs do not identify any filing associated with this alleged transaction nor identify any statement alleged to be false.	• Statute of limitations precludes claim. • No filing or false statement alleged.
48, 655	**May 1998 issue of 35 million shares Enron common stock at $25 per share:** Plaintiffs do not identify any filing associated with this alleged transaction nor identify any statement alleged to be false.	• Statute of limitations precludes claim. • No filing or false statement alleged.
48, 81(a), 655, 1019	**July 1998 issue of $500 million 6.40% and 6.95% Enron Notes:** False statements made as underwriter in registration statement and prospectus	• Statute of limitations precludes federal claim. • Complaint fails to allege that sale took place in Texas. • No false statement alleged.

[3] The Complaint interchangeably refers to a July 1997 issue of 6-5/8% Enron notes, *see id.* ¶ 48, and an October 1997 issue of 6-5/8% Enron notes. *See id.* ¶ 655.

¶	CHALLENGED STATEMENT	REASON WHY NOT ACTIONABLE
48,[4] 655, 662	**February 1999 issue of 27.6 million shares Enron common stock at $31.34 per share:** Plaintiffs do not identify any filing associated with this alleged transaction nor identify any statement alleged to be false.	• Statute of limitations precludes claim. • No filing or false statement alleged.
48, 655[5]	**February 2001 (private placement) and July 2001 (resales) issue of $1.9 billion Enron zero coupon convertible notes:** Plaintiffs do not identify any filing associated with the alleged transactions nor identify any statement alleged to be false.	• No filing or false statement alleged. • JPMorgan Chase not alleged to be a seller of securities.
656	**October 2000 issue of 27.6 shares of New Power at $21 per share:** Plaintiffs do not identify any filing associated with this alleged transaction nor identify any statement alleged to be false.	• No filing or false statement alleged.
656	**July 2001 issue of $1 billion Marlin Water Trust-II and Marlin Water Capital-II 6.19% and 6.31% notes:** Plaintiffs do not identify any filing associated with this alleged transaction nor identify any statement alleged to be false.	• No filing or false statement alleged.

[4] JPMorgan Chase is not alleged to be an underwriter of these securities in paragraph 48 of the Complaint.

[5] The July 2001 transaction is not referred to in paragraph 655.